Supreme Court, U. S.
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80-161

No.

IN THE SUPREME COURT OF THE UNITED STATES

DONALD FREEDLANDER,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Does payment of a portion of a lawful fee received by a laboratory in connection with furnishing Medicaid services to doctors who referred specimens and provided assistance to said laboratory constitute a "kickback" within the meaning of 42 USC §1396h(b)(1) and is the pre-1977 version of said statute unconstitutionally vague and inadequate to warn a defendant that his conduct is prohibited?

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TO THE UNITED STATES COURT OF APPEALS
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Donald Freedlander, by and through his attorney Neil H. Fink, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming his conviction for violation of 42 USC §1396h(b)(1), filed June 16, 1980.

OPINIONS BELOW

By an unpublished opinion dated March 16, 1979, the United States District Court for the Eastern District of Michigan denied defendants' motions to dismiss the charges. The District Court's subsequent opinion denying defendant's motion for rehearing is reported as *United States* v *Weingarden*, 468 F Supp 410 (E.D.Mich 1979). The Opinion of the Sixth Circuit Court of Appeals filed June 16, 1980, affirming the District Court's opinions and the Petitioner's conviction is reprinted in full as Appendix A hereto. That Opinion has not, as of this writing, been published.

JURISDICTION

The Opinion and Order appealed from was filed June 16, 1980. The jurisdiction of this court is invoked under 28 USC §1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 42 §1936h(b)(1), prior to 1977 amendment, provides:

> (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of the Federal funds under a State plan approved under this title [42 USCS §§1396-1396d, 1396f-1396i] and who solicits, offers, or receives any—
>
> > (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment,
> >
> > * * * *
>
> shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

STATEMENT OF THE CASE

Defendant-Appellant, DONALD FREEDLANDER, D.O., was indicted on September 21, 1978, along with twelve co-defendants, in a 37-count Indictment, charging various violations of 18 USC §1962 and 18 USC §1341. A follow-up Information was subsequently filed, charging the Defendant-Appellant, along with four other defendant doctors, with receiving kickbacks in connection with furnishing medical services to Medicaid patients in violation of 42 USC §1396h(b)(1).

The pertinent portion of the Amended Follow-Up Information charging Dr. Freedlander, reads as follows:

> [T]he Government contends Donald Freedlander, D.O. received monetary payments from an entity related to Titan Laboratories, Inc., namely M.A. Delaney, Inc., principally to induce Donald Freedlander, D.O. to send his laboratory work to Titan Laboratories, Inc. In addition, it was agreed that Donald Freedlander would perform the following services: (1) to form and assist in the formation of J.K.F., Inc., as described in Indictment Number 78-80689, and (2) to encourage other doctors to send their laboratory work to Titan Laboratories, Inc., as described in Indictment Number 78-80689. The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc. was entitled. That is, when Titan Laboratories, Inc. was asking for payment for specific blood work, that blood work had been done and that the billing for that blood work was in accordance with Medicaid statutes and regulations.

Paragraphs 18 through 21 of the Indictment indicate that the formation of J.K.F., Inc. was originally proposed by officers and employees of Titan Laboratories, Inc. as a

means for a group of doctors to obtain an interest in the laboratory. Dr. Freedlander played an active role in assisting in the formation of J.K.F., Inc. and in encouraging other doctors to send their laboratory work to Titan Laboratories. He was among the group of doctors who incorporated as J.K.F. for the purpose of purchasing forty percent of the stock of Titan Laboratories. The stock was to be purchased for $75,000.00, which was to be built up in an escrow account held on behalf of J.K.F. by Joseph Donnelly, the attorney for the corporation. The doctors associated with J.K.F. sent their laboratory business to Titan and Titan paid a sum equal to ten percent of the total monthly billings of the J.K.F. doctors into the escrow account held by Donnelly. At the point in time when the J.K.F. escrow account had reached $60,000.00, the member doctors decided to pay the last $15,000.00 out of their own money in order to effectuate the purchase early, and they subsequently received and divided 40% of the Titan stock.

Numerous pretrial motions to dismiss the Indictment and/or Information were filed or joined by Dr. Freedlander. On March 16, 1979, the Honorable Cornelia Kennedy filed a written Opinion and Order denying one defendant's Motion to Dismiss the Indictment and Information, which incorporated by reference all other defendants' motions to dismiss.

Subsequent to the decision in *United States* v *Porter*, 591 F2d 1048 (5th Cir, 1979) issued by the United States Court of Appeals for the Fifth Circuit on March 21, 1979, the defendants orally moved for rehearing of their motions to dismiss. The Trial Court issued a written Opinion and Order on April 3, 1979, refusing to follow the *Porter* decision and denying the motion for rehearing. *U.S.* v *Weingarden*, 468 F Supp 410 (ED Mich 1969).

On April 10, 1979, Dr. Freedlander entered a plea of guilty to counts 17 through 21 of the Information as amended. Each count charged a separate check made payable to Dr. Freedlander, drawn on the account of M.A. Delaney, Inc. on a specific date.

Dr. Freedlander admitted, as a factual basis for his plea of guilty, that he received the monetary payments from M.A. Delaney, Inc. in return for his active aid in the formation of J.K.F., Inc. and his subsequent encouragement of other physicians to send their laboratory work to Titan Laboratories, Inc., in addition to his continuing to send all of his own lab work to Titan.

The defendant's disagreement with the Trial Court's view of the applicable law and his intention to appeal the question of whether the Information stated an offense was indicated both at the time of his plea and later in the Motion in Arrest of Judgment, which was filed on his behalf and denied by the Court on April 24, 1979.

Petitioner appealed his conviction and sentence to the Sixth Circuit Court of Appeals as a matter of right. On June 6, 1980, a panel of that Court affirmed his conviction.

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT COURT OF APPEALS' DECISION UPHOLDING THE CONSTITUTIONALITY OF THE PRE-1977 VERSION OF 42 USC §1396h(b) (1) AND OF THE SUFFICIENCY OF THE INFORMATION FILED IN THE INSTANT CASE IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER AND IMPROPERLY EXPANDS THE SCOPE OF SAID STATUTE AND DEPRIVES THE DEFENDANT OF HIS RIGHT TO BE WARNED THAT HIS CONDUCT WAS PROHIBITED BY SAID STATUTE.

It is, and has always been, the position of the Petitioner that the information filed in this case did not state an offense under 42 USC §1396h(b) (1) and that the pre-1977 version of said statute was unconstitutionally vague. He nonetheless entered a plea of guilty subsequent to the district court's two opinions rejecting the defendant's position and the recent appellate law he cited, and upholding the sufficiency of the Information and the statute. *US* v *Weingarden, supra.* Since Petitioner indicated his intent to appeal at the time of his plea and subsequently filed a Motion in Arrest of Judgment pursuant to FRCP 34, raising jurisdictional defects, his right to appeal was not waived by the guilty plea. Thus, the Sixth Circuit Court of Appeals was presented with a question of first impression dealing generally with the scope and validity of the pre-1977 version of 42 USC §1396h(b) (1), and specifically with the definition of kickbacks as used therein.

Both the legislative history and the case law interpreting the term "kickback" within the context of this statute are relatively sparse. Nonetheless, both the district court and appellate court in this case had the advantage of the recent decision rendered by the United States Court of Appeals for the Fifth Circuit in *US* v *Porter,* 591 F2d 1048 (5th Cir, 1979). The *Porter* Court dealt precisely with the term "kickback" within the context of 42 USC §1395nn(b), which deals with the Medicare rather than the Medicaid program, but is otherwise of identical language and legislative history

as the statute to be construed in the instant case. In that case, doctors referred their blood specimens from Medicare patients to manual laboratories which received a substantially higher rate of reimbursement for Medicare than automated laboratories, and in return paid the doctors "handling fees" of up to $35.00 per specimen. These handling fees were often paid to the doctors through dummy corporations which were set up solely for this purpose. The Court in *Porter* held that payments by a laboratory which received lawful fees under the Medicare program and shared such fees with doctors who had referred their specimens to the laboratories did not constitute "bribes or kickbacks" within the meaning of the statute.

In reaching the decision and defining "kickbacks" within the context of the statute, the Fifth Circuit Court of Appeals took note of several basic axioms of judicial construction, all of which are equally applicable to the case at bar. Noting that this was a case of first impression, where the terms "kickback" and "bribe" were not defined within the statute, and there being no accumulated jurisprudence on the actual meaning, the Court followed the assumption that Congress used these words as they are commonly understood. See, *United States* v *Stewart,* 311 US 60, 63, 61 SCt 102, 85 LEd 40 (1940). In finding such ordinary meaning of the terms, the Court looked to similar statutes, common law and common sense, and took note of the following language of Justice Jackson in *Morissette* v *United States,* 342 US 246, 72 SCt 240, 96 LEd 288 (1952):

> "Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely

accepted definitions, not as a departure from them." 342 US at 263, 72 SCt at 250.

Moreover, following the holding in *Smith* v *United States*, 360 US 1, 79 SCt 991, 3 LEd 2d 1041 (1959), the statute was construed strictly against the prosecution and in favor of the accused. In accordance with the policy of lenity, any doubt as to whether the defendant's conduct was prescribed was resolved in favor of the accused. *Ladner* v *United States*, 358 US 169, 1978, 79 SCt 209, 3 LEd 2d 199 (1958).

With the above principles in mind, the *Porter* Court went on to define "kickback" within the "ordinary parlance" as the "secret return to *an earlier possessor* of part of the sum received" (591 F2d at 1054; emphasis in original).

The Fifth Circuit Court of Appeals in *Porter* cited with approval the Second Circuit's decision in *United States* v *Zacher*, 486 F2d 912 (2nd Cir, 1978), which interpreted the terms "kickbacks" and "bribes" within the meaning of 42 USC §1396h(b) (1) as "involv[ing] a corrupt payment or receipt of payment in violation of the duty imposed by Congress on providers of services to use Federal funds only for intended purposes and only in the approved manner." 586 F2d at 916, quoted in 591 F2d at 1054. The Second Circuit Court of Appeals' survey of the jurisprudence of said terms resulted in the conclusion that "courts have consistently understood the word 'bribe' to encompass acts that re *malum in se* because they entail either a breach of trust or duty or the corrupt selling of what our society deems not to be legitimately for sale . . . it is this element of corruption that distinguishes a bribe from a legitimate payment for services." 586 F2d at 916.

Application of the definitions ennumerated in *Zacher* to the facts in *US* v *Porter, supra*, led to the *Porter* Court's determination that "the receipt of the money by the labs in no way violated the law." The Fifth Circuit went on to

reject the government's contention that the sharing of lawful fees received by the laboratory with the doctor who had referred the specimen to the lab was a violation of 42 USC §1395nn(b); stating that:

> "[t]here was no outstanding restriction on what the lab could do with the money once it received it." 591 F2d at 1054.

Petitioner's argument that the Information did not sufficiently charge an offense is also strengthened by reference to the subsequent history of the statute, as noted in *United States* v *Porter, supra*. Dr. Freedlander pled guilty to the 1972 version of 42 USC §1396h(b) (1). Both that provision and 42 USC §1395nn(b) were amended by Congress in 1977. Not only were the penalties increased, but the wording of the statutes made the description of the crime much more specific. *Porter* cites the legislative history of that amendment for the fact that Congress and many United States attorneys believed "that the existing language of these penalty statutes is unclear and needs clarification." H.R. Rep. No. 95-393(II), 95th Cong., 1st Session 53 (1977), reprinted in [1977] U.S. Cong. & Admin. News, pp. 3039, 3055.

Thus, the Court concluded:

> "If the meaning of the 1972 version of 42 USC §1395nn(b) was not clear and precise to the Congress and to the United States Attorneys charged with enforcing the law, then we are hard put to say, with that degree of confidence required in a criminal conviction, that these defendants were given clear warning by that statute that their conduct was prohibited by it, thus amounting to a criminal act." 591 F2d at 1054.

The facts in *Porter* could not possibly be closer to those present in the case at bar. The charges against Dr. Freedlander arise in connection with payments made to him by a laboratory to which he submitted his blood specimens which were covered under Medicaid. As in *Porter*, the defendant-appellant herein was often paid through a third party corporation, rather than directly by the laboratory. Further, the Information specifically states that:

> "The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc. were entitled."

Thus, applying the rationale used in *Porter*, once the laboratory had received this lawful fee they were not restricted in how they disposed of it, and the mere sharing of such a fee with the doctor does not constitute an offense.

In addition, the payment scheme charged in the case at bar does not allege any "return to an earlier possessor" as would be necessary to charge a "kickback" as that term is defined in *United States* v *Porter, supra*, nor are there any allegations of "corrupt payments" which would allege a "kickback" within the interpretation applied by the Second Circuit in *United States* v *Zacher, supra*. Yet, despite the direct applicability of *Porter* and the absence of any applicable case law to the contrary, the district judge refused a rehearing of defendant's motions to dismiss immediately subsequent to the issuance of the *Porter* decision. The district court's opinion, published as *US* v *Weingarden*, 468 F Supp 410 (Ed Mich, 1979), consisted of numerous definitions of the term "kickback" as used within the context of statutes other than the one at issue. While the definitions cited by the trial court were significantly broader than the "kickback" definition set forth in *Porter*, it is crucial to note that not one of the cases relied on by the trial court defined the term "kickback" within the context of a criminal statute.

The only other Court of Appeals that has yet had the opportunity to construe the "kickback" statutes is the Seventh Circuit in its recent opinion in *United States* v *Hancock*, 604 F2d 999 (7th Cir, 1979). There the defendant doctors were charged with kickback violations under 42 USC 1396h(b)(1) for payments labeled "handling fees" which they received from the laboratory to which they referred their Medicare and Medicaid recipients blood and tissue specimens. Both defendants entered a plea of nolo contendere to one count, and on appeal raised the contention that the indictment did not sufficiently allege the crime of receiving a kickback under §1396h(b)(1).

While the Seventh Circuit adopted the *Zacher* definition of "kickbacks" as involving "corrupt payments", the convictions in *Hancock* were affirmed on the Court's finding that the indictments did allege "corrupt payments" and such payments were admitted by the defendants pleas to those indictments.

The Sixth Circuit's opinion in the instant case is of little help in resolving the apparent conflict and defining the scope of the statute, since it totally fails to deal substantively with the issues.

Over 75% of the Court of Appeals majority opinion consists of a verbatim reiteration of the counts of the Information pled to by each of the five defendants, as well as the factual basis of the plea offered by each defendant. The Court seems to miss the point that it is the sufficiency of the *Information* not the sufficiency of the plea that is at issue here.

The Court's actual decision on the issue consists of a choice from among the decision offered by the two previous Court of Appeals decisions and the ready-made opinion of the district court in this matter, rather than any independent analyses of the law.

> "We agree with the definition of 'kickbacks' adopted and applied by the Seventh Circuit in *United States*

> v *Hancock*, 604 F2d 699 (7th Cir. 1978). We follow that decision in affirming the decision of the district court that appellants have entered pleas of guilty under an Information charging them with violations of a valid statute which made their conduct a criminal offense. The record demonstrates to our satisfaction that the payments which the appellants admitted receiving were 'kickbacks' within the meaning of the statute.
>
> "We choose to follow the Seventh Circuit in *Hancock*, rather than *United States* v *Porter*, 591 F2d 1048 (5th Cir. 1979). The reasons for this conclusion are stated well by Judge Kennedy in her published opinion. 468 F Supp at 412-15.
>
> "Appellants contend that they did not 'furnish' the services in connection with which they received payments, and that the Information does not charge an offense. These and all other contentions made by appellants have been considered and found to be without merit" Slip opinion, p. 17.

Petitioner submits that the Sixth Circuit decision is incorrect for a variety of reasons. The Court's strong reliance on *United States* v *Hancock, supra,* is misplaced since although the petitioner herein did enter a plea rather than proceeding to trial, the Information to which he pled did not allege any corrupt payments as found in *Hancock*. Moreover, the instant Information specifically stated that the claims were filed by the laboratory in accordance with the Medicaid statute and that the monies received were those to which it was entitled. In addition, the Information to which Dr. Freedlander pled recognized the fact that the payments he received from the laboratory were not merely in return for sending his laboratory work there, but also in payment for his services in assisting in the formation of J.K.F., Inc., and encouraging other doctors to send their laboratory work to Titan Laboratories, Inc.

The Appellate Court's adoption of the district court's opinion in the case at bar ignores the fact that the cases and definitions cited in said opinion were not controlling in the context of a criminal statute and hence inapplicable to the case at bar.

The Sixth Circuit's "choice" of the broader definition of "kickback" enunciated in Judge Kennedy's opinion and in the Court's interpretation of the Seventh Circuit's *Hancock* opinion rather than the definitions set out by the Second Circuit in *Zacher* and the Fifth Circuit in *Porter* constitutes a clear violation of the most fundamental rules of statutory construction—that criminal statutes are to be strictly construed in favor of the defendant and will not be enlarged by implicatio or intendment. *Smith* v *United States*, 360 US 1 (1959); *Ladner* v *United States*, 358 US 169 (1958). Taken one step further, the strict construction rule provides: "if [statutory] words are capable of two constructions, that more favorable to [the accused] prevails." *Ornelas* v *United States*, 236 F2d 392 (9th Cir, 1956), citing *United States* v *Resnick* 299 US 207 (1936) and *United States* v *Halseth*, 342 US 277 (1952). Under such principles the *Porter* and *Zacher* definitions must prevail.

Prosecutions under the statute involved herein and under companion statutes have begun very recently, yet are becoming quite proliforous. The proper interpretation and scope of the law presents a question of first impression to the courts confronted with it and the clear conflict of decisions emerging from those Courts of Appeals who have ruled on said statute creates the untenable situations where the question of whether a person's conduct constitutes a violation of a federal criminal statute is dependent upon which portion of the country said conduct occurs in.

This Court has not yet addressed the problem of the scope and validity of the pre-1977 version of 42 USC §1936h(b) (1).

Such a ruling is desperately needed to guide the lower

courts in the proper interpretation and application of the law and to warn the people of this country whether or not their conduct is in violation of a federal criminal statute. The case at bar presents an appropriate vehicle through which to promulgate such a ruling.

CONCLUSION

For these reasons the Court should issue a Writ of Certiorari to the Sixth Circuit Court of Appeals, that it might review the substantial question herein posed.

Respectfully submitted,

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DATED: July 11, 1980

APPENDIX

Nos. 79-5222-24, 79-5269-70

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD TAPERT, HARVEY GOLDEN, GERALD WEINGARDEN, DONALD FREEDLANDER and ROBERT GASH,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 16, 1980.

Before: WEICK and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge, delivered the opinion of the Court, in which WEICK, Circuit Judge, joined. JONES, (pp. 18-20) filed a separate concurring opinion.

PHILLIPS, Senior Circuit Judge. These are consolidated appeals by five Detroit osteopathic physicians who were convicted of receiving kickbacks for sending urine and blood samples of their patients to Titan Laboratories (Titan) for analysis. All five of the physicians were enrolled in the Medicare and Medicaid programs and the charges for the laboratory analysis were paid to Titan out of Medicare and Medicaid funds. The district court held that the payments violated

the original version of 42 U.S.C. § 1936h(b),[1] which was in effect during the years involved in this case. In 1977 Congress amended the statute so as to remove any possible doubt that conduct such as that involved in the present case violates the Act.[2]

The principal issues on this appeal are whether the information under which appellants were convicted charges a vio-

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[1] (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this title [42 USCS §§ 1396-1396d, 1396f-1396i] and who solicits, offers, or receives any —

(1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or

(2) rebate of any fee or charge for referring any such individual to another person for the furnishing of such items or services

shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

[2] The amended § 1396h(b)(1) is as follows:

(b)(1) Whoever solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) Whoever offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility,

lation of the pre-1977 version of 42 U.S.C. § 1396h(b)(1) (note one), and whether the statute is unconstitutional for vagueness. Then Chief District Judge Cornelia Kennedy, now a judge of this court, ruled that the payments to the doctors were kickbacks, that the information charges a violation of the statute and that the statute is not invalid for vagueness. We affirm.

I

Apparently Titan initiated the arrangement for the kickbacks, by having its representative contact one of the physicians.[3] In return for payments from Titan or one of its affiliates, the physician agreed to send his patients' specimens to Titan and to encourage his colleagues to do the same. Other physicians entered into similar agreements, which Titan described as "consulting" arrangements. This pattern of activity began in April 1974 and continued until January 1978.

Beginning in 1976, the physicians began depositing their Titan checks in an escrow fund for the purpose of acquiring an interest in Titan. The fund was administered by J.K.F. Inc., a corporation set up by the physicians to hold the Titan

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service, or item for which payment may be made in whole or in part under this subchapter,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to—

(A) a discount or other reduction in price obtained by a provider of services or other entity under this subchapter if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under this subchapter; and

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services.

[3] *See United States* v. *Shermetaro*, —— F.2d —— (No. 79-5148, 6th Cir. 1980), in which this court affirmed the conviction of one of the parties to this scheme under 18 U.S.C. § 371 for conspiracy to defraud the United States by obstructing the collection of income taxes from Titan Laboratories.

stock they proposed to buy. When the escrow fund reached $60,000, the physicians contributed an additional $15,000 and J.K.F. Inc. acquired a 40 per cent interest in Titan.

On September 21, 1978, a federal grand jury returned a 37 count indictment against appellants, five other individuals and three Michigan corporations. On February 2, 1979, the Government filed a 42 count follow-up information charging appellants with soliciting and receiving Medicare and Medicaid kickbacks from Titan and associated entities. The information thereafter was amended. The version under which appellants were convicted is referred to in the record as the Amended Follow-Up Information.

Judge Kennedy denied the motions of appellants to dismiss the indictments. Thereafter, in a published opinion, she denied their motions for a rehearing. *United States* v. *Weingarden,* 468 F.Supp. 410 (E.D. Mich. 1979). In this opinion Judge Kennedy held that the pre-1977 version 42 U.S.C. § 1396h(b)(1) prohibited the conduct charged in the information, and that the challenged statute was sufficiently clear to give to appellants adequate notice that their alleged conduct was illegal.

Thereafter, under a plea bargaining agreement, each of the appellants entered a plea of guilty to certain counts of the information applicable to him. The Government approved dismissal of the indictment.

II

Prior to their guilty pleas, the appellants gave notice that they intended to appeal the ruling of the district court on the applicability of § 1396h(b)(1). To preserve the issue for appeal, they moved for arrest of judgment under Fed. R. Crim. P. 34 on the ground that the statute did not apply to their conduct and the district court, therefore, had no jurisdiction to accept their guilty pleas. This is the procedure approved by this court in *United States* v. *Heller,* 579 F.2d

990, 992-93, and n. 1 (6th Cir. 1978). *See also North Carolina* v. *Alford*, 400 U.S. 25, 37-38 (1970); *United States* v. *Cox*, 464 F.2d 927, 941 (6th Cir. 1972). The Government concedes that the alleged defects raised by appellants are jurisdictional and not waived by their guilty pleas. Consequently the legal issue is properly before this court.

III

Dr. Gerald Weingarden entered a plea of guilty to Counts three through seven of the amended follow-up information, which are as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Gerald Weingarden, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., Spartan Laboratories, Inc., and M. A. Delaney, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.
>
> To wit, the Government contends Gerald Weingarden, received monetary payments labelled "consulting fees" from an entity related to Titan Laboratories, Inc., namely Spartan Laboratories, Inc., principally to induce the defendant to send his laboratory work to Titan. In addition, it was agreed that the defendant would perform the following services: (1) to form and assist in the formation of J.K.F., Inc., as described in indictment Number 78-80689, and (2) to encourage other doctors to send their laboratory work to Titan, as described in Indictment Number 78-80689.
>
> Gerald Weingarden visited Titan Laboratories, Inc., from time to time, in connection with the performance of the above-described services.

The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood work had been done, and that the billing for that blood work was in accordance with medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
3	October 27, 1976	$1,000	Spartan Laboratories, Inc.
4	November 22, 1976	$1,000	Spartan Laboratories, Inc.
5	December 28, 1976	$1,000	Spartan Laboratories, Inc.
6	March 1, 1977	$1,000	Spartan Laboratories, Inc.
7	March 1, 1977	$1,000	Spartan Laboratories, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Weingarden admitted that he had committed the acts charged in the information.

Dr. Harvey Golden entered a plea of guilty to counts 11 through 15 of the Information, which charged as follows:

On or about the dates listed below, in the Eastern District of Michigan, Harvey Golden, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and Media Technology, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, Harvey O. Golden D.O., received monetary payments from Titan Laboratories, Inc., in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were

those to which Titan Laboratories, Inc., were entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood work had been done, and that the billing for that blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
11	May 27, 1974	$850	Titan Laboratories, Inc.
12	August 8, 1974	$900	Media Technology, Inc.
13	September 3, 1974	$1,500	Titan Laboratories, Inc.
14	October 24, 1974	$1,000	Titan Laboratories, Inc.
15	December 6, 1974	$1,500	Titan Laboratories, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Golden testified as follows:

THE COURT: Knowing those things, how do you wish to plead at this time to Counts 11, 12, 13, 14, 15?

DEFENDANT GOLDEN: Guilty, your Honor.

THE COURT: Will you tell me in your own words what it is that you did do that causes you to plead guilty?

DEFENDANT GOLDEN: Part of my motives I stated, perhaps an equal amount of my motives were for the inducement of monetary gain.

THE COURT: In other words, to receive payment from Titan for sending work to Titan?

DEFENDANT GOLDEN: Yes.

THE COURT: And some of that work at least was Medicare and Medicaid work?

DEFENDANT GOLDEN: Yes, your Honor.

THE COURT: Would that be true for all of the periods involved here, May 27, 1974, through December 6, 1974?

DEFENDANT GOLDEN: Yes, your Honor.

Dr. Donald Freedlander entered a plea of guilty to counts 17 through 21 of the Information, which charged as follows:

On or about the dates listed below, in the Eastern District of Michigan, Donald Freedlander, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and M. A. Delaney, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, the Government contends Donald Freedlander, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely M. A. Delaney, Inc., principally to induce Donald Freedlander, D.O., to send his laboratory work to Titan Laboratories, Inc. In addition, it was agreed that Donald Freedlander would perform the following services:

(1) to form and assist in the formation of J.K.F., Inc., as described in Indictment Number 78-80689, and (2) to encourage other doctors to send their laboratory work to Titan Laboratories, Inc., as described in Indictment Number 78-80689.

The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., were entitled.

That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood work had been done, and that the billing for that blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
17	August 23, 1976	$200	M. A. Delaney, Inc.
18	August 23, 1976	$200	M. A. Delaney, Inc.
19	September 7, 1976	$200	M. A. Delaney, Inc.
20	September 10, 1976	$200	M. A. Delaney, Inc.
21	September 15, 1976	$200	M. A. Delaney, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Freedlander testified as follows:

> THE COURT: Will you tell me what it was that you did on or about the dates mentioned that causes you to plead guilty? What did you do on or about August 23rd, 1976, with regard to these checks apparently from M. A. Delaney, Inc.?
>
> DEFENDANT FREEDLANDER: These checks were received by me, yes, your Honor, they were received by me.
>
> THE COURT: You received the checks described in Counts 17, 18, 19, 20, 21?
>
> DEFENDANT FREEDLANDER: Yes, I did, your Honor.
>
> THE COURT: From M. A. Delaney?
>
> DEFENDANT FREEDLANDER: Yes, I did.
>
> THE COURT: And did you have some relationship at least with Titan Laboratories as stated in the information?
>
> DEFENDANT FREEDLANDER: Yes, I did, your Honor.
>
> THE COURT: And did that include some kind of business involving Medicare and Medicaid?
>
> DEFENDANT FREEDLANDER: Right.
>
> THE COURT: In other words, this was business with Titan Laboratories that included some business relating to Medicare and Medicaid samples?
>
> DEFENDANT FREEDLANDER: Yes, your Honor.
>
> THE COURT: Did you receive these payments for sending work to Titan Laboratories?
>
> DEFENDANT FREEDLANDER: Yes, I did, your Honor.
>
> THE COURT: Did you perform any services for these companies, M. A. Delaney and Titan Lab?
>
> DEFENDANT FREEDLANDER: Yes, I did, your Honor, I helped with the formation and was of assistance to the J.K.F. Corporation.
>
> • • •

THE COURT: You have said something about, among other things, and that was kind of confusing to me, except for setting up J.K.F. Corporation, did you provide any other services to Titan Laboratories?

DEFENDANT FREEDLANDER: Yes, among other things, I encouraged other physicians to send their work to the laboratory.

THE COURT: In other words, there may not be a factual basis for this plea other than the statement that you in fact performed services besides sending business to Titan Lab?

MR. FINK: I think under the general intent statute, I don't think there has to be a dominant purpose, your Honor. He has indicated that that was one of the things he received consideration for.

THE COURT: As long as it is clear, and I am not so sure it is clear from the statement, was one of the reasons that you received these payments from Titan Lab, or from M. A. Delaney, Inc., because you were sending your lab business to Titan Laboratories, was that one of the reasons?

DEFENDANT FREEDLANDER: In the total, yes, it was. It was part of it. It was one of the reasons.

• • •

THE COURT: In view of the fact it uses the word wilfully and that there were other considerations, I think we should at least really know what he does wish to plead guilty. I have a little problem with the factual basis under his statement. Maybe I can ask him this question.

Was the referral of business to Titan Laboratories a substantial or significant reason?

DR. FREEDLANDER: They were among the reasons, you know, a combination as to the rest of it, why, I received the compensation, yes, your Honor.

THE COURT: I am still trying to find out if it was significant at all or was it just minor?

DEFENDANT FREEDLANDER: Well, when I say significant, your Honor, there are several components involved. Is this more strongly than this one or that

one, as the case may be, as I say, I did give my blood work to the laboratory, I did help assist them, I did help in getting other doctors referred to them, and with the combination of everything I don't know where to put the weight on each one as to compensation, but all were done by me, that is true, and I did receive the compensation.

MR. FINK: Your Honor, the 1952 cases that you are familiar with, the Interstate travel in aid of racketeering cases, which are specific intent crimes, which I don't think this is, do not require the dominant purpose to be the travel, it can be a co-equal purpose.

THE COURT: Is he going to say it was co-equal with the other things?

DEFENDANT FREEDLANDER: With the other things, yes.

• • •

THE COURT: As long as we get something that was co-equal with other services of recruiting doctors and helping to form this other corporation, the three of them would be co-equal?

DEFENDANT FREEDLANDER: Yes, your Honor.

THE COURT: I think that that is sufficient for that.

• • •

THE COURT: I think I should ascertain that.

Did you, in fact, submit blood samples to Titan Laboratories?

DEFENDANT FREEDLANDER: That I did, your Honor.

THE COURT: And they were from Medicare and Medicaid patients?

DEFENDANT FREEDLANDER: Yes, they were.

MR. ROSEN: That's sufficient.

THE COURT: I think I asked that but maybe not so directly.

MR. ROSEN: I have nothing further.

THE COURT: And that was during the time period of these checks that were received from M. A. Delaney?

DEFENDANT FREEDLANDER: Yes, they were, your Honor.

THE COURT: And the payments from M. A. Delaney were for the three purposes: One because you sent your lab work to Titan; two, because they indicated tests; and, three, you were supplying other doctors to send their work to J.K.F. and/or others?

DEFENDANT FREEDLANDER: Yes, your Honor.

THE COURT: And you did what you did knowingly?

DEFENDANT FREEDLANDER: Yes, I did, your Honor.

THE COURT: Having discussed these matters this afternoon, do you still wish to plead guilty to Counts 17, 18, 19, 20 and 21?

DEFENDANT FREEDLANDER: Yes, I do.

Dr. Richard Tapert entered a plea of guilty to counts 27 through 31 of the Information, which charged as follows:

On or about the dates listed below, in the Eastern District of Michigan, Richard Tapert, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and Associated Physicians Services Co., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, Richard Tapert, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely Associated Physicians Services Company, in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., was

entitled. That is, when Titan Laboratories, was asking for payment for specific blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
27	June 24, 1975	$200	Associated Physicians Services, Co.
28	August 12, 1975	$200	Associated Physicians Services, Co.
29	September 9, 1975	$500	Associated Physicians Services, Co.
30	October 17, 1975	$200	Associated Physicians Services, Co.
31	December 10, 1975	$200	Associated Physicians Services, Co.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Tapert testified as follows:

THE COURT: How do you plead to counts 27 through 31?

THE DEFENDANT: I plead guilty.

THE COURT: Will you tell me what it was that you did do that causes you to plead guilty to those counts?

THE DEFENDANT: I accepted monetary payments from Associated Physicians Service Company in exchange for referring my laboratory work to Titan Laboratory.

THE COURT: And did you do that knowingly?

THE DEFENDANT: Yes, I did.

THE COURT: Are there any other questions the Government would like me to ask?

MR. ROSEN: Maybe your Honor could inquire as to the taking of blood samples from Medicare-Medicaid patients.

THE COURT: Yes, during this period of time that these payments were made, was some of the work that you were referring to Titan Laboratory or Associated Physicians Medicare and Medicaid work?

THE DEFENDANT: Yes.

THE COURT: For Medicare and Medicaid patients?

THE DEFENDANT: That is correct.

THE COURT: And would that be true during the period of each of these payments

THE DEFENDANT: Yes.

THE COURT: Any other questions, Mr. Rosen

MR. ROSEN: No, your Honor.

THE COURT: Have you had plenty of time to discuss this matter with your attorney?

THE DEFENDANT: Yes, I have.

THE COURT: And he has explained to you what it is the Government has to prove to prove you guilty?

THE DEFENDANT: Yes.

THE COURT: And you understand also that this is a final disposition insofar as this Court is concerned, that this plea of guilty, if the Court accepts it, it will not set aside the plea of guilty should an appeal be unsuccessful on the legal issues, do you understand?

THE DEFENDANT: I understand.

THE COURT: Having discussed these matters this afternoon, do you still wish to plead guilty to these counts?

THE DEFENDANT: Yes, I do.

Dr. Robert Gash entered a plea of guilty to count 36 of the Information, which charged as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Robert Gash, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and Associated Physicians Services, Co., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, Robert Gash, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely Associated Physicians Services Company, in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan were in accordance with the Medicaid statutes and regulations and the monies received by Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
36	August 11, 1975	$200	Associated Physicians Services, Co.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

In his Rule 11 sentencing hearing, Dr. Gash testified as follows:

THE COURT: Will you tell me what you did on or about August 11, 1975 that causes you to plead guilty?

DEFENDANT GASH: On or about August 11, 1975, I received a check for $200.00 from Associated Physicians Services, Inc., for submission of lab work to Titan Laboratories.

THE COURT: To Titan Laboratories?

DEFENDANT GASH: Yes.

THE COURT: And was some of that lab work at least lab work under both Medicare and Medicaid?

DEFENDANT GASH: I would have to assume so. I really don't know that, your Honor.

THE COURT: But ordinarily there would be some within the work that you would submit within a month?

DEFENDANT GASH: I would say so, yes.

THE COURT: Does the Government have some evidence that some of this was?

MR. ROSEN: Yes, it does, your Honor.

THE COURT: Are there any other questions you would like to ask?

MR. ROSEN: No, your Honor.

THE COURT: Having discussed this matter this afternoon, do you still wish to plead guilty to Count 36?

DEFENDANT GASH: Yes, your Honor.

IV

In asserting that the statute was not sufficiently broad prior to the 1977 amendment to make their activities a criminal offense, and that the statute under which they were convicted is invalid for vagueness, appellants rely strongly upon the fact that Congress found it necessary to enact the 1977 amendment.

An amendment to an existing statute is not an acknowledgment by Congress that the original statute is invalid. It is a common and customary legislative procedure to enact amendments strengthening and clarifying existing laws.

The report of the House Committee on Ways and Means contains the following statement on the purpose of the 1977 amendment:

> Your committee bill would modify the penalty provisions *in existing law* which relate to those persons providing services under medicare and medicaid.
>
> *Existing law* provides specific penalties under the medicare and medicaid programs for certain practices that long have been regarded by professional organizations as unethical, which are unlawful in some jurisdictions, and which contribute significantly to cost of the programs. Such practices as the submission of false claims, or the soliciting, offering, or *acceptance of kickbacks* or bribes, *including rebates or [sic] a portion of fees or charges for patient referrals, are misdemeanors under present law* . . .
>
> Recent hearing and reports, however, indicate that such penalties have not proved adequate deterrents against illegal practices by some individuals who provide services under medicare and medicaid. In addition, these misdemeanor penalties appear inconsistent with

> existing Federal criminal code sanctions which make similar actions punishable as felonies. Also, it has been brought to the attention of the committee by the U.S. Attorney's offices which have utilized these Social Security Act sanctions in the prosecution of medicare and medicaid fraud cases that the existing language of these penalty statutes is unclear and needs clarification.
>
> Your committee's bill would strengthen the penalty provisions *in existing law* which relate to persons providing services under medicare and medicaid . . .
>
> In addition, the bill would *clarify and restructure* those *provisions in existing law* which define the types of financial arrangements and conduct to be classified as illegal under medicare and medicaid. (Emphasis added.) H.R. Rep. No. 95-393(II), 95th Cong., 1st Sess. *reprinted in* (1977) U.S. Code Cong. & Ad. News 3039, 3055.

We agree with the definition of "kickbacks" adopted and applied by the Seventh Circuit in *United States* v. *Hancock*, 604 F.2d 699 (7th Cir. 1978). We follow that decision in affirming the decision of the district court that appellants have entered pleas of guilty under an Information charging them with violations of a valid statute which made their conduct a criminal offense. The record demonstrates to our satisfaction that the payments which the appellants admitted receiving were "kickbacks" within the meaning of the statute.

We choose to follow the Seventh Circuit in *Hancock*, rather than *United States* v. *Porter*, 591 F.2d 1048 (5th Cir. 1979). The reasons for this conclusion are stated well by Judge Kennedy in her published opinion. 468 F.Supp. at 412-15.

Appellants contend that they did not "furnish" the services in connection with which they received payments, and that the Information does not charge an offense. These and all other contentions made by appellants have been considered and found to be without merit.

The convictions are affirmed.

JONES, Circuit Judge, concurring. I agree that the term "kickback" should be defined to include "a percentage payment for granting assistance by one in a position to open up or control a source of income." *United States* v. *Hancock*, 604 F.2d 999, 1002 (7th Cir. 1978). The United States has an important interest in securing the honest administration of federally funded programs. *United States* v. *Thompson*, 366 F.2d 167 (6th Cir.), *cert. denied*, 385 U.S. 973 (1966). I write separately to discuss a substantial issue of first impression concerning the construction of 42 U.S.C. § 1396h (b) (1) (1972): Is a physician, who provides services to medicaid patients and who receives illegal kickbacks from laboratories for the referral of those patients, for which referrals federal funds do not reimburse the doctor or the laboratory, a person who "*furnishes* items or services to an individual *for which* payment is or may be made in whole or part out of Federal funds . . . *and* who . . . receives any (1) kickback . . . *in connection* with the furnishing of *such* items or services . . .?" I concur with the majority's affirmative answer.

The language of the amended informations and the guilty pleas, as thoroughly reported in the majority opinion, define the facts of the case.[1] The defendants were charged with and pleaded guilty to receiving payments in various forms from a laboratory for patient referrals. The informations allege that the defendants "obtained services" from a laboratory, for which services medicaid would pay in part, and that the

[1] According to my construction of § 1396h (b) (1), the amended informations do state an offense. In his zeal to uphold the guilty pleas, the Assistant United States Attorney argued seriously that this Court should consider the amended informations to have been informally amended by oral argument and by his response to the defendants' motion to dismiss the informations. Further, he contended that the district court had *implicitly* granted leave for this informal second amendment. The Government's position is not supported in the record and is an attempt to play "fast and loose" with the established rules of criminal procedure and principles of due process. Such overly zealous advocacy should be tempered. In other respects, the Assistant United States Attorney prepared a fine brief.

defendants received kickbacks in connection with these services. Consequently, the relevant services for which federal funds were paid are the tests performed by the laboratory. The record also establishes that the defendants were reimbursed by medicaid for their treatment of the same patients referred to the laboratories.

The facts raise two questions of statutory interpretation: 1) did the physicians "furnish" the laboratory services; and 2) were the kickbacks paid "in connection with" the laboratory services rather than just the patient referrals? Defendants argue that they did not "furnish" the laboratory services, since the laboratory actually performed the tests. They point out that their services were reimbursed separately from the laboratory tests. Second, they argue that the kickbacks were paid "in connection with" the patient referrals rather than any service for which medicaid funds were paid. They declare that the kickbacks did not affect their treatment of patients or the laboratory's performance of tests.

It is fair to say that physicians in Michigan in 1976-1977 furnished the laboratory services to their patients. The physicians took the specimens and sent them to a laboratory. A laboratory could act only on orders from the physicians. Mich. Comp. Laws Ann. §§ 325.81(b), 325.89(b), repealed by Mich. Comp. Laws Ann. § 333.20501 *et seq.* (1978); *cf.* 42 C.F.R. § 405.1316(e) (Medicare regulations). The laboratory could report the test results only to the physicians, unless they instructed otherwise. Mich. Adm. Code R. 325.2353(2) (Rule 53); *cf.* 42 C.F.R. § 405.1316(g) (Medicare regulations). The physicians bore the responsibility of interpreting the test data. In short, the physicians did everything but actually perform the clinical tests. Under these circumstances, by interpreting the word "furnish" according to its common usage to mean "supply or provide", I would hold that the physicians did "furnish" the laboratory services.

The physicians received the kickbacks "in connection with" the laboratory services. The statute is satisfied if there is

a logical relationship between the kickbacks and the services for which federal funds were paid. In our case, the kickbacks were an agreed part of the performance of the laboratory services. The relationship between the physicians and the laboratory was formed around the payment of the kickbacks. The physicians chose to refer patients to a specific laboratory because of the negotiated kickback payments. The phrase "in connection with" has a sufficiently broad meaning in common parlance to conclude that the kickbacks were received "in connection with" the laboratory services.

The legislative history bolsters my interpretation of § 1396h (b) (1) as enacted in 1972. Congress intended to prohibit in the administration of the Medicaid program any practices which were unethical or were proscribed by state law. H. R. Rep. No. 92-231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4989, 5007, 5093, 5308. The physicians' receipt of kickbacks for patient referrals to the laboratory is forbidden by both Section 21 of the Code of Ethics of the Michigan Association of Osteopathic Physicians and Surgeons and by state statute, Mich. Comp. Laws Ann. § 445.162. Similarly, a laboratory is prohibited from soliciting business by paying kickbacks. Mich. Comp. Laws Ann. § 333.20525(c) (1978). Since the language of the statute permits, § 1396h (b) (1) should be interpreted to effectuate congressional intent. *Barrett* v. *United States*, 423 U.S. 212 (1976); *United States* v. *Tarter*, 522 F.2d 520 (6th Cir. 1975). The ordinary meaning of the statutory language and the 1972 legislative history compel the conclusion that the physicians' receipt of kickbacks under the circumstances in this case is a violation of § 1396h (b) (1).

Finally, because the ordinary meaning of the plain language of § 1396h (b) (1) would have notified the defendants that their conduct was unlawful, the statute is not unconstitutionally vague. *United States* v. *Hancock*, 604 F.2d at 1002.

Accordingly, I concur with the opinion and judgment of the majority.

Supreme Court, U. S.
FILED
OCT 3 1980
MICHAEL RODAK, JR., CL

No. 80-161

In the Supreme Court of the United States

OCTOBER TERM, 1979

DONALD FREEDLANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner's indictment sufficiently charged the receipt of "kickbacks" in violation of 42 U.S.C. 1396h(b)(1).

2. Whether 42 U.S.C. 1396h(b)(1) is unconstitutionally vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–20a) is reported at 625 F.2d 111. The opinion of the district court is reported at 468 F. Supp. 410.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1980. The petition for a writ of certiorari was filed on July 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of Michigan to five counts of an information charging receipt of kickbacks in connection with furnishing services to individuals for which payments are made by Medicaid funds, in violation of 42 U.S.C. 1396h(b)(1).[1] Petitioner was sentenced to serve 45 days under a work-release program and to pay a fine of $10,000 on each count. Petitioner entered his guilty plea shortly after the trial court issued an opinion and order denying the defendants' motion to dismiss the indictment. *United States* v. *Weingarden*, 468 F. Supp. 410 (E.D. Mich. 1979). The court of appeals affirmed (Pet. App. 1a–20a).

The allegations of the information to which petitioner and his co-defendants pleaded guilty are quoted verbatim in the opinion of the court of appeals. The information charged that during August and September of 1976 petitioner "did knowingly and wilfully solicit and receive

[1] Petitioner's co-defendants, Richard Tapert, Harvey Golden, Gerald Weingarden, and Robert Gash, also pleaded guilty to receiving kickbacks (Pet. App. 4a). All five defendants were Detroit osteopathic physicians (*id.* at 1a).

kickback payments from Titan Laboratories, Inc., and M.A. Delaney, Inc. * * * principally to induce [him] to send his laboratory work to Titan Laboratories, Inc." and that the laboratory work was paid for in part with Medicaid funds (Pet. App. 8a).

ARGUMENT

1. Petitioner contends (Pet. 4–11) that the information is legally insufficient because the facts it alleges do not constitute a violation of the "kickback" provision of the pre-1977 version of the Medicaid statute, 42 U.S.C. 1396h(b)(1).[2] This claim is incorrect.

Petitioner relies principally on *United States* v. *Porter*, 591 F.2d 1048 (5th Cir. 1979), in support of his argument that the term "kickback" does not refer to a payment made to a party other than the party who initially transferred the sum to the payor, and that, since the scheme alleged in the information involved no payments from himself to the laboratory but only referrals of specimens, the payments by the laboratory to him were not illegal "kickbacks." The *Porter* decision held that "[i]n ordinary parlance, a kickback is the secret return to *an earlier possessor* of part of a sum received." 591 F.2d at 1054 (emphasis in original). While *Porter* supports petitioner and conflicts with the decision below and with that of the Seventh Circuit in *United States* v. *Hancock*, 604 F.2d 999, cert. denied, 444

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[2] Prior to its amendment in 1977, 42 U.S.C. 1396h(b)(1) provided:

> (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any—
>
> (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment * * *
>
> shall be guilty of a misdemeanor * * *.

U.S. 991 (1979), the conflict does not warrant review by this Court.[3]

First, the Fifth Circuit's narrow definition of "kickback" is plainly incorrect. As the district court's opinion demonstrates (468 F. Supp. at 412–414), the term "kickback," in both legal and lay usage, commonly refers to the receipt of money by a person (usually an agent) who has the ability to influence the disbursement of funds belonging to other persons or entities (often funds belonging to the agent's principal, but in this case Medicaid funds belonging to the federal government). Far from being an essential feature of the concept, prior ownership or possession of those funds by the recipient of the kickback is rare. Indeed, under the *Porter* definition of "kickback" it is difficult to imagine who could violate 42 U.S.C. 1396h(b)(1). Only

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[3]Petitioner asserts (Pet. 9–10) that the court of appeals' reliance upon *Hancock* was misplaced because the kickbacks in *Hancock* involved "corrupt payments," whereas here there were no allegations of "corrupt payments." But the conduct alleged here was in fact precisely the same as that alleged in the *Hancock* indictment—the receipt of kickbacks in return for referring Medicaid or Medicare patients' blood to a laboratory for diagnostic testing. In both cases, the payments were "corrupt" because they involved the "selling of what our society deems not to be legitimately for sale" (*United States* v. *Zacher*, 586 F.2d 912, 916 (2d Cir. 1978)), and a breach of the "duty imposed by Congress on providers of services to use federal funds only for intended purposes and only in the approved manner" (*ibid.*). It is worth noting in this connection that, since 1973, Michigan law has provided that "[a] person licensed to practice medicine * * * shall not receive a fee or other remuneration from a clinical laboratory or an intermediary for a clinical laboratory for submitting specimens from patients to a clinical laboratory." Mich. Stat. Ann. § 14.375(22) (1976). Violation of this section is a misdemeanor. Mich. Stat. Ann. § 28.199 (1962), § 28.772 (1972). Likewise, Section 21 of the Code of Ethics of the Michigan Association of Osteopathic Physicians and Surgeons provides that "[a] physician shall not pay or receive compensation for referral of patients." The legislative history of former 42 U.S.C. 1396h(b)(1) refers to "penalties for certain practices which have long been regarded by professional organizations as unethical, as well as unlawful in some jurisdictions* * *." S. Rep. No. 92–1230, 92d Cong., 2d Sess. 208 (1972).

government officials would have prior possession of the Medicaid funds; but since they are not providers of services, they could not violate the statute. It should not be assumed that Congress passed a statute defining a crime that no one can commit.

Second, the statutory language in question was amended in 1977 to leave no possible doubt that the kind of payments petitioner received are prohibited kickbacks. Thus, the conflict with *Porter* is of little continuing significance.[4] The 1977 clarifying amendment to 42 U.S.C. 1396h(b)(1) punishes "[w]hoever solicits or receives any *remuneration* (including any kickback, bribe, or rebate) * * *in return for referring an individual to a person for the furnishing * * * of any * * * service [reimbursable under Medicaid]" (emphasis added). 42 U.S.C. (Supp. II) 1396h(b)(1)(A).[5]

2. Petitioner also suggests (Pet. 4, 7) that the pre-1977 version of 42 U.S.C. 1396h(b)(1) is unconstitutionally vague. His whole argument on this point consists of a quotation from *Porter* (591 F.2d at 1054):

> If the meaning of the 1972 version of 42 U.S.C. § 1395nn(b) [the Medicare counterpart of 42 U.S.C. 1396h(b)(1)] was not clear and precise to the Congress and to the United States Attorneys charged with enforcing the law, then we are hard put to say, with that degree of confidence required in a criminal conviction, that these defendants were given clear warning by that statute that their conduct was prohibited by it, thus amounting to a criminal act.

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[4]This Court denied certiorari in *Hancock* in which the petitioners alleged the very same conflict. The issue is even less worthy of review now.

[5]The legislative history of the 1977 amendment makes it clear that Congress believed that it was merely clarifying, not altering, the original law enacted in 1972. See Pet. App. 16a–17a.

This argument is specious. Both courts below correctly rejected the "inference drawn in *Porter* that because 42 U.S.C. § 1395nn(b) was amended in 1977 due to a Congressional desire for further clarification, the statute was insufficiently clear before amendment so as not to give adequate due process warning that the conduct at issue was prohibited." 468 F. Supp. at 414–415. As this Court has observed, the "fact that Congress might, without difficulty, have chosen '[c]learer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague." *United States* v. *Powell*, 423 U.S. 87, 94 (1975), quoting *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). Because "the term kickback has a commonly understood meaning," the statute gave petitioner "fair notice that [his] conduct was forbidden." *United States* v. *Hancock*, *supra*, 604 F.2d at 1002. Compare *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162–163 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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